IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

: J U D G M E N T :

S.B. Civil First Appeal No.50/1989.
(Gopal Singh Vs. Gaj Singh & Others)

DATE OF JUDGMENT : July 18, 2007

P R E S E N T

Hon'ble Mr. Justice Gopal Krishan Vyas

Mr. K.C. Samdariya for the appellant.
Mr. Rajesh Joshi for respondents.

BY THE COURT :

By way of filing the present appeal under Section 96 of the Code of Civil Procedure defendant Gopal Singh is challenging the judgment and decree dated 27.04.1989 passed by Addl. District Judge, Bhilwara in Civil Original Suit No.63/77.

According to facts emerging from the suit, respondent Gaj Singh s/o Baldeo Singh filed suit for partition and appellant Gopal

Singh s/o Baldeo Singh, Smt. Gulab Kanwar wd/o Baldeo Singh and Smt. Prem Kanwar d/o Baldeo Singh were impleaded as defendants in the suit. Obviously, the plaintiff and defendants are legal heirs of late Baldeo Singh. In the suit, plaintiff Gaj Singh made a prayer that decree may be passed for partition of the property of late Baldeo Singh and half portion of the property may be decreed in his favour and possession thereof may be delivered to him. The plaintiff further prayed in the suit that income of the property from the date of filing suit till his possession may also be decreed in his favour.

According to plaint, plaintiff's father Baldeo Singh died on 17.11.1973 leaving behind two sons, a daughter and his widow Smt. Gulab Kanwar (respondent No.2). Before his death, all his three children were got married and since his death his widow Smt. Gulab Kanwar lived with defendant-appellant Gopal Singh. During his life time, late Baldeo Singh owned properties mentioned in list – 'क' and the plaintiff claimed in the suit half of the property as his share.

After issuance of the suit summonses, in response to the plaintiff's plaint, defendant-appellant Gopal Singh filed written-statement in which he has specifically stated that the property in question is not property of joint family and the list submitted by

the plaintiff is wrong. It was averred in the written-statement that partition of the property has already taken place and they are in possession of their respective portions of the property. The appellant refuted other averments made in the plaint. It is specifically contended in the written-statement that plaintiff Gaj Singh is living separately after his marriage since before the death of their father Baldeo Singh and before that he had obtained his share of the property, therefore, the suit filed by the plaintiff Gaj Singh is false and he is not entitled to get any relief in the suit.

After filing of the written-statement, the trial Court framed the following three issues :

> "(1) आया दावे के साथ संलग्न सूची {क} में दर्ज सम्पत्ति संयुक्त परिवार की है जिसका वादी बटवाडा कराने का अधिकारी है ?
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> (2)आया दरम्यान पक्षकार पंच फैसला हो चुका है और इस कारण यह दावा चलने योग्य नहीं है ?
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> (3) पक्षकार किस सहायता के अधिकारी हैं ?"

At the trial of the suit, in evidence the plaintiff examined himself as P.W.-1 and, on the other hand, in defence, D.W.-1 Gopal Singh and D.W.-2 Smt. Gulab Kanwar got their statements recorded. After hearing arguments and upon appreciation of the evidence coming on record, the trial Court delivered the judgment and passed preliminary decree in favour of the plaintiff

as under :

> "अत: वादी के पक्ष में एवं प्रतिवादी संख्या 1 व 2 के विरूद्ध सुनकर तथा प्रतिवादिया संख्या 3 के विरूद्ध एक पक्षीय प्रारम्भिक डिक्री इस प्रकार अनुदत्त की जाती है कि वादी वादपत्र में संलग्न सूचि {क} में अंकित क्रमांक 1, 2, 3, 4 व 8 का बटवारा कराकर आधा हिस्सा पाने का अधिकारी है। डिक्री इसी प्रकार से बनायी जावे

The aforesaid order was made by the trial Court in the impugned judgment having found that the properties mentioned in list – **'क'** are joint-family properties inasmuch as defendant-appellant admitted in his cross-examination that whatever property they had was ancestral property but the same has been divided among them, however, he also did not claim the property as his personal property. Upon appreciation of the entire evidence on record, the trial Court found that there is no evidence of division of the suit property among the co-sharers in respect of items No.1, 2, 3, 4 and 8 of list – **'क'** and, accordingly, held the plaintiff-respondent entitled to receive his half share of the said properties.

Challenging the validity of the impugned judgment and decree, it is vehemently contended by learned counsel for the appellant that the judgment of the trial Court suffers from material illegality inasmuch as the trial Court while holding that the plaintiff is entitled to receive his share of the property failed

to examine the evidence and record finding as to how the plaintiff is entitled to half share of the property, therefore, the preliminary decree passed by the trial Court to the extent of determining half share in favour of the plaintiff is erroneous and illegal. It is argued by the learned counsel that before the trial Court the plaintiff did not lead any evidence to show that he was entitled to half share in the property.

It is further contended that according to Section 8 of the Hindu Succession Act all the parties litigating in the suit are legal heirs of late Baldeo Singh being his relatives enumerated in clause (I) of the Schedule appended to the Act and, therefore, all the four legal heirs of late Baldeo Singh litigating in the suit have equal share in the property in accordance with Section 10 of the Hindu Succession Act.

On the other hand, learned counsel for respondent No.1 Gajesingh vehemently argued that it is preliminary decree and admittedly the plaintiff-respondent has a right to his share in the property of late baldeo Singh, therefore, the impugned judgment does not require any interference.

I have carefully gone through the impugned judgment whereby the preliminary decree has been passed in favour of the plaintiff-respondent. In my opinion, the trial Court failed to

appreciate in the suit that all the parties litigating are Class-I heirs of late Baldeo Singh and, therefore, provisions of Hindu Succession Act are attracted in the matter for the purpose of passing a preliminary decree. When the status of the parties to the suit is identical and the trial Court has categorically held that no previous partition of the property has taken place, for the purpose of passing a preliminary decree, without there being any evidence on record with regard to apportionment of share, the trial Court has committed illegality in determining the extent of share of the plaintiff in the property by way of passing the preliminary decree. Sections 8 and 10 of the Hindu Succession Act are attracted in the matter and, therefore, the impugned decree so far as plaintiff is held entitled to the extent of half share cannot be sustained.

As a result of the foregoing discussion, the appeal is partly accepted and order passed by the trial Court, quoted hereinabove, vide the impugned judgment dated 27.04.1989 is modified as under :

> **"**अत**:** वादी के पक्ष में एवं प्रतिवादी संख्या **1** व **2** के विरूद्ध सुनकर तथा प्रतिवादिया संख्या **3** के विरूद्ध एक पक्षीय प्रारम्भिक डिक्री इस प्रकार अनुदत्त की जाती है कि वादी वादपत्र में संलग्न सूचि **{**क**}** में अंकित क्रमांक **1, 2, 3, 4** व **8** का हिन्दू उत्तराधिकार अधिनियम की धारा **8** व **10** की अनुपालना में बटवारा कराकर अपना हिस्सा पाने का अधिकारी है। डिक्री इसी प्रकार से बनायी जावे**"**

In pursuance of the above modification in the decree passed by the trial Court, let fresh decree be prepared accordingly.

(Gopal Krishan Vyas) J.